

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's injury and disability?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant, Michael G. Nance, suffered a three and one-half percent (3.5%) permanent partial disability to the body as a whole as a result of injuries suffered to his low back arising out of and in the course of his employment with the respondent, Harvey County.

Claimant was working for the respondent on April 20, 1990, when a stack of bridge planks, which he was helping to unload, began to fall. The claimant prevented the stack from falling. He did not notice any physical problems at that time. Approximately thirty (30) minutes later, after working underneath a truck, he found he could not get off the creeper. When he finally could get up, he was in pain.

Claimant talked to his supervisor and was referred to Dr. Jane Pirner, a Wichita chiropractor. Dr. Pirner saw claimant on April 24, 1990, at which time he complained of severe low back pain, upper thoracic pain and shooting pain into the right side of his neck. Dr. Pirner treated claimant for approximately two (2) weeks during which time she did not allow him to work. She ultimately diagnosed a cervical strain/sprain and a lumbar strain/sprain with degenerative disc disease at L5-S1, confirmed by x-ray. While Dr. Pirner felt claimant had a legitimate injury, she did not believe the injury would result in any permanent impairment. Approximately two and one-half (2½) weeks after the injury she returned claimant to work, light duty. She did not continue her treatment program as claimant was referred to Dr. Bernard Poole, by the respondent, for examination and treatment. Between the time of treatment by Dr. Pirner and Dr. Poole, claimant returned to work for approximately five (5) hours on one day but was unable to continue due to back pain.

Dr. Poole saw claimant on May 10, 1990, at which time he complained of mid-back pain, posterior left leg pain, and some right arm pain. Dr. Poole felt he might have lumbar spondylolisthesis or mild degenerative changes at L5-S1. Claimant's range of motion was restricted but his neurological findings were normal. X-rays did confirm slight degenerative changes at L5-S1. Claimant's continued complaints caused the doctor concern and he was referred for an MRI which showed disc degeneration but no herniation at L5-S1. Claimant was referred for physical therapy but proved to be non-compliant with the rehabilitation exercise program and the course was never completed. No objective pathology was found to account for the severity of claimant's symptoms. Due to these inconsistent findings, Dr. Poole referred claimant for a Cybex test which showed inconsistencies, which could indicate attempted voluntary manipulation by the claimant. When Dr. Poole discussed this finding with the claimant, apparently the claimant became angry and left the doctor's office. This was the last time Dr. Poole examined the claimant.

The claimant was referred by the company to Gwen Kasha, RN, who was placed in charge of claimant's medical management program. As a result of this referral, claimant was sent to Dr. Henry O. Marsh at Ms. Kasha's recommendation. Dr. Marsh, an orthopedic surgeon, first examined claimant on August 9, 1990, with his initial impression being

possible back and shoulder problems. Dr. Marsh continued claimant off work, treating him conservatively. He diagnosed lumbosacral joint sprain with sciatic nerve irritation. A repeat MRI was performed with questionable findings followed by a myelogram and CT scan. The tests showed diffused disc bulging at the lowest level of the back with no rupture, herniation, or nerve involvement. The claimant exhibited several unusual symptoms. He exhibited pain from the Faber's test which was unusual because this hip and knee flexion test should have given relief from back pain, with the painful result being the exact opposite of that expected. Also, when the doctor pushed on the top of claimant's head, claimant felt pressure in the lumbosacral area, which is an impossible finding. Dr. Marsh was advised of the results of the Cybex testing done by Dr. Poole which caused him to refer claimant back to Wesley Hospital for a second evaluation. Claimant never attended this evaluation. Dr. Marsh found no neurological deficits in claimant's upper extremities. He advised Ms. Younger, the vocational rehabilitation specialist, that there was data to question the validity of the claimant's symptoms and that claimant needed to return to work. A full release was provided on March 11, 1991. Dr. Marsh confirmed claimant had degenerative disc disease at L5-S1 which he indicated was reasonably normal for a person his age and activity. Dr. Marsh initially believed the claimant's complaints were legitimate but later decided he was being misled by the claimant.

Claimant was examined by Dr. Ernest R. Schlachter on October 20, 1992, at the request of his attorney. Claimant exhibited numerous physical complaints not supported on physical examination. Claimant was at this time alleging injuries to his right shoulder which Dr. Schlachter was unable to confirm through testing. X-rays of the right shoulder displayed no difficulties.

During Dr. Schlachter's evaluation of the claimant's shoulder he found a full range of motion, no rotator cuff weakness and no neurological deficits in the right upper extremity. Claimant had a 170-pound grip strength in the right hand which was very good. The only finding was a complaint of pain when the arm was held horizontal.

Dr. Schlachter, nevertheless, diagnosed chronic sprain to the right shoulder, absent physical findings, and awarded claimant a two percent (2%) functional impairment to the body as a whole as a result of the right shoulder injury. Based upon the lack of physical evidence to support his opinion, the Appeals Board finds the rating to the claimant's right shoulder to be less than credible and same is not accepted as objective medical evidence in this case.

When Dr. Schlachter examined claimant's back he found a normal balanced pelvis and no muscle spasms. Claimant was capable of sitting and bending forward and putting his chin on his knees without pain. Extension from flexion, hyperextension, right lateral and left lateral rotation and bending were all carried out with a full range of motion without pain. Neck flexion was normal without pain. Deep tendon reflexes were present and equal bilaterally, which was normal. There was no muscle weakness in any of the muscle groups of the lower extremities which was normal. Measurements of the thighs and calves were within normal limits and leg length was found to be normal. Vibratory sensation was present and equal, with no sensory defects in the lower extremities.

Dr. Schlachter found no neurological problems on physical examination. All tests including the compression, flexion, Lasegue's, Patrick's, and Faber's test were normal with no tenderness to palpation over the sciatic notch or sciatic nerves. Claimant walked without a limp and was capable of walking on heels and toes with no difficulty. Claimant did deep knee bends, got down on all fours and performed pushups, without complaints of pain to any of the lower extremities or the right shoulder.

Dr. Schlachter assessed claimant a seven percent (7%) impairment to the body as a whole to the lumbar spine, even considering the almost total lack of objective physical findings from the examination of the claimant.

K.S.A. 44-501(a) states in part:

“In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.”

K.S.A. 44-508(g) defines burden of proof as follows:

“‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

“Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.”

Neither Dr. Marsh, Dr. Poole, nor Dr. Pirner felt claimant suffered a permanent impairment as a result of the complaints for which claimant was provided treatment. Only Dr. Schlachter felt claimant had a resulting permanent impairment. The Appeals Board, in reviewing the medical evidence, finds the examination to claimant's shoulder to be normal without justification for an award. As such, the claimant is denied an award for the alleged injury to his shoulder. The Appeals Board does believe it is more probably true than not true that claimant has some impairment to the low back as degenerative disc disease was confirmed both through x-ray and MRI. However, the almost totally normal examination by Dr. Schlachter does not support the doctor's opinion of a seven percent (7%) impairment to the body as a whole for the lumbar spine problems. The Appeals Board finds a more appropriate functional impairment would be three and one-half percent (3.5%) to the body as a whole which gives equal weight to Dr. Schlachter's seven percent (7%) and the zero percent (0%) impairment provided by Dr. Poole and Dr. Marsh.

The evidence presented against the claimant reveals a deliberate intent by the claimant to mislead the doctors and the Court regarding his condition and what impairment he may have suffered as a result of the incident of April 20, 1990. Evidence in the record indicated claimant was physically capable of doing far more than he let on. Witnesses for the respondent testified regarding the claimant's physical abilities and misrepresentation of his condition in order to collect additional benefits through the workers compensation system. Claimant's vocational rehabilitation experience was unsuccessful in part due to claimant's lack of effort when looking for a job, and during his aborted attempt at obtaining additional education and training.

Permanent partial general disability is the extent to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced taking into consideration the employee's education, training, experience and capacity for rehabilitation. See K.S.A. 44-510e(a).

The Appeals Board finds that claimant's attitude, potential misrepresentation and apparent lack of effort creates an unreliable record from which to assess the claimant's abilities in either performing work in the open labor market or earning comparable wages. The opinion of two (2) qualified treating physicians that claimant was intentionally attempting to mislead them, coupled with the security testimony provided by Barbara Steil of Silver Hawk Investigators and claimant's attempted manipulation when tested on the Cybex machine, creates a record so clouded as to make it impossible to assess what, if any, work disability may or may not exist in this matter. The Appeals Board believes the functional impairment awarded above is sufficient to adequately compensate claimant for any permanency he may have suffered as a result of the April 20, 1990, incident.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge Jeff K. Cooper dated February 14, 1994, should be, and is hereby, modified, in that claimant is awarded compensation against respondent, Harvey County, and its insurance carrier, Northwestern National Insurance Company, for a three and one-half percent (3.5%) permanent partial impairment to the body as a whole on functional basis.

Claimant is awarded 116.57 weeks of temporary total disability compensation at the rate of \$271.00 per week totaling \$31,590.47 followed by 298.43 weeks of permanent general body disability at the rate of \$11.87 per week totaling \$3,542.36 for a three and one-half percent (3.5%) permanent partial general body disability making a total award of \$35,132.83.

As of July 15, 1994, there would be due and owing to the claimant 116.57 weeks of temporary total disability compensation at the rate of \$271.00 per week totaling \$31,590.47 followed thereafter by 104.57 weeks of permanent general body disability at the rate of \$11.87 per week totalling \$1,241.25 followed thereafter by 193.86 weeks permanent partial general disability at the rate of \$11.87 per week until fully paid or until further order of the Director.

Claimant is awarded future medical upon application to the Director.

Pursuant to K.S.A. 44-536 the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid as follows:

KELLEY, YORK & ASSOCIATES, LTD.	
Deposition of Cindy Younger, Dated January 9, 1992	\$ 271.60
Deposition of Michael G. Nance, Dated April 10, 1991	\$ 171.50
Deposition of D. Marjorie Thiesen, Dated July 1, 1991	\$ 162.92
Deposition of Dr. Jane Pirner, Dated November 21, 1991	\$ 253.65

Deposition of Henry O. Marsh, M.D., Dated September 9, 1991	\$ 242.40
Deposition of Bernard T. Poole, M.D., Dated September 24, 1991	\$ 106.30
Deposition of William R. Beck, M.D., Dated September 18, 1991	\$ 67.60
<b>TOTAL</b>	<b>\$1275.97</b>
BARBER & ASSOCIATES	
Preliminary Hearing of November 3, 1992	\$ 92.20
Preliminary Hearing of March 12, 1992	\$ 113.50
Regular Hearing of August 19, 1992	\$ 204.70
<b>TOTAL</b>	<b>\$ 410.40</b>
IRELAND AND BARBER	
Preliminary Hearing of August 1, 1991	\$ 101.00
Preliminary Hearing of April 18, 1991	\$ 307.20
<b>TOTAL</b>	<b>\$ 408.20</b>
DON K. SMITH & ASSOCIATES	
Deposition of Jerry D. Hardin, Dated October 1, 1992	\$ 287.50
Deposition of Ernest R. Schlachter, M.D., Dated October 20, 1992	\$ 203.00
<b>TOTAL</b>	<b>\$ 490.50</b>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 1995.

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BOARD MEMBER\_\_\_\_\_  
BOARD MEMBER\_\_\_\_\_  
BOARD MEMBER

cc: Steven L. Foulston, Wichita, Kansas  
Melvin L. Gregory, Wichita, Kansas  
Jeff K. Cooper, Special Administrative Law Judge  
Philip S. Harness, Director